Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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Nos. 88-429, 88-494
(Consolidated)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC CITIZEN,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

WASHINGTON LEGAL FOUNDATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, and AMERICAN BAR ASSOCIATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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TABLE OF CONTENTS

Page

District Court Relevant Docket Entries 1

Complaint of Washington Legal Foundation for Declaratory and Injunctive Relief 5

Declaration of Steve A. Matthews 20

Complaint of Plaintiff-Intervenor Public Citizen For Declaratory and Injunctive Relief . . . 24

Affidavit of Joan Claybrook 28

Plaintiff-Intervenor's Statement of Material Facts as to Which There is No Genuine Dispute 31

Proposed Order for Public Citizen's Motion for Summary Judgment 33

Defendant's Statement of Material Facts As to Which There is No Genuine Dispute . 34

Plaintiff-Intervenor's Response to Defendant's Statement of Material Facts as to Which There is No Genuine Dispute 36

Plaintiff's Conditional Response to Defendant's Statement of Material Facts as to Which There is no Genuine Dispute 38

TABLE OF CONTENTS continued

Page

ABA Committee Brochure 43

Affidavit of Plaintiff
Pursuant to F.R.CIV.PRO. 56(f) 53

Plaintiff's Statement of Material Facts
As to Which There is No Genuine Issue . . 56

Proposed Order for Washington Legal Foundation's
Alternative Motion for Summary
Judgment 58

Defendant's Response to Plaintiff's Statement of
Material Facts as to Which There is No
Genuine Dispute 59

Answer of Defendant-Intervenor American Bar
Association to Complaint of
Washington Legal Foundation 62

Answer of Defendant-Intervenor American Bar
Association to Complaint of
Plaintiff-Intervenor Public Citizen 69

RELEVANT DOCKET ENTRIES

86cv2883 WASHINGTON LEGAL FOUNDATION
v. DOJ

DATE	NR	PROCEEDINGS
10/21/86	1	COMPLAINT filed; Exhibits (4); summons issued (ew) [Entry date 10/28/86]
1/2/87	5	MOTION by defts. to dismiss; Attachments; Declaration of Steve A. Matthews.
2/4/87	8	MOTION by Fed. R. Civ. P., Public Citizen to intervene as pltf; Exhibit (Complaint). (ja)
2/4/87	9	MOTION by pltf-intervenor for summary judgment. (ja)
2/4/87	10	OPPOSITION by pltf to deft's motion to dismiss. (ja)
2/17/87	13	RESPONSE by pltf to public citizen's motion to intervene. (ja)
3/12/87	14	ORDER filed 3/11/87 granting motion of Public Citizen leave to intervene as a party pltf; directing Clerk to file pltf-intervenor's Complaint; and deft's reply to opposition of pltf and intervenor to motion to dismiss to be filed by 3/25/87, see order of Feb 13, 1987. (N) GREEN, J. (ja)
3/12/87	15	COMPLAINT filed 3/11/87 by Public Citizen. (ja)

3/25/87	16	OPPOSITION by deft to pltf-intervenor's motion for summary judgment and reply to pltfs' oppositions to deft's motion to dismiss. (ja)
4/13/87	17	OPPOSITION by pltf-intervenor to deft's motion to dismiss or in the alternative for summary judgment; Exhibits (2). (fiat) (ja) "Let this be filed" GREEN, J.
1987		
May 1	18	ORDER filed 4/30/87 setting a hearing on cross-motions for summary judgment for 5/26/87 at 9:30 AM, pltf and pltf-intervenor granted 20-mins. whether the deft granted 40-mins. (N) GREEN, J. (ja)
May 8	19	CONDITIONAL RESPONSE by pltf to deft's statement of material facts; Exhibit, Affidavit. "Let this be filed" (fiat) GREEN, J. (ja)
May 12	20	MOTION (Alternative) by pltf for summary judgment. (ja)
5/18/87	21	OPPOSITION by deft to pltf's alternative motion for summary judgment. (ja)
5/27/87		CROSS-MOTIONS for summary judgment, argued and taken under advisement. (Rep. Gordon Slodysko) GREEN, J. (ja)
1988		
8/8/88	29	MEMORANDUM OPINION filed 8/4/88 and ORDER denying plaintiff's motion for

summary judgment; granting defendant's motion to dismiss or for summary judgment. (N) GREEN, J. (ja)

8/8/88 30 JUDGMENT filed 8/4/88 is entered against plaintiff Washington Legal Foundation and plaintiff-intervenor Public Citizen and in favor of defendant U.S. Department of Justice. (N) GREEN, J. (ja)

8/25/88 31 MOTION by AMERICAN BAR ASSOCIATION to intervene as party deft; EXHIBITS (Answers to complaints). (ja)

8/25/88 32 ORDER granting AMERICAN BAR ASSOCATION'S motion to intervene as party deft. (N) GREEN, J. (ja)

8/25/88 33 ANSWER by intv-deft American Bar Assoc. to complaint of pltf Washington Legal Foundation. (ja)

8/25/88 34 ANSWER by intv-deft American Bar Assoc. to complaint of intv-pltf Public Citizen. (ja)

1988

Aug 26 35 NOTICE OF APPEAL by pltf Washington Legal Foundation to the U.S. Supreme Court from judgment entered 8/8/88. $5.00 filing fee paid. (ja)
(Supreme Court #88-429)

Sep 1 36 NOTICE OF APPEAL by pltf-intv. Public Citizen to the U.S. Supreme Court from judgment entered 8/8/88. $5.00 filing fee paid.

(ja)

(Supreme Court #88-494)

Dec 6	37	CERTIFIED copy of order from Supreme Court of the United States that the statement of jurisdiction having been submitted and considered by the Court and probable jurisdiction is noted, condolidating case numbers 88-429 and 88-494 in the Supreme Court. (USSC NO. 88-429. (mln)
Dec 23		RECORD on appeal to the Supreme Court delivered on 12/23/88: Receipt Acknowledged 12-23-88 . (mln)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION 1705 N Street, N.W. Washington, D.C. 20036 Plaintiff, v. U.S. DEPARTMENT OF JUSTICE 10th & Pennsylvania Avenue, N.W. Washington, D.C. 20530 Defendant.	)	JOYCE HENS GREEN, J. Civil Action No. 86-2883 OCT 21 1986

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This action seeks to enjoin the Department of Justice ("DOJ") from utilizing the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") as an advisory committee with respect to the federal judicial selection process in violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. I. Plaintiff requests declaratory and injunctive relief with respect to, inter alia, DOJ's failure to provide reasonable advance public notice of advisory committee meetings and to require that such meetings be open to the public, and DOJ's failure to maintain and provide the plaintiff and public access to advisory committee records.

JURISDICTION

2. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202.

PARTIES

3. Plaintiff Washington Legal Foundation is a non-profit public interest law center incorporated under the laws of the District of Columbia and has over 200,000 members and supporters nationwide. WLF engages in a broad range of public interest legal activities, including litigation before the federal courts, involving issues of constitutional law, government regulation, national security and defense, criminal justice reform and judicial government accountability. WLF has also engaged in activities specifically designed to improve the judiciary and wishes to participate further in the federal judicial selection process including attending and participating in meetings held by the ABA Committee, reviewing their records and reports, and providing relevant information to WLF's members and the public. To that end, WLF requested information from the ABA Committee as further described in ¶¶15-18 infra, which was denied.

4. Defendant Department of Justice is a government agency subject to the requirements of FACA. DOJ has utilized and continues to utilize the ABA Committee as a preferred source of advice on the judicial nominating process including soliciting the ABA's advice on the suitability of persons under consideration for nomination and appointment to Article III courts.

STATEMENT OF THE CLAIM

5. Plaintiff realleges ¶¶1-4 and incorporates them herein by reference.

6. Before an individual can be formally nominated for a federal judgeship, he or she is required by the defendant U.S. Department of Justice to complete an application called a Personal Data Questionnaire. The questionnaire was designed by the ABA and is utilized by the Department of Justice in conjunction with the ABA Committee. At all relevant times, judicial applicants have completed and are continuing to complete this questionnaire.

7. Responses to the questionnaire by the applicant have been and are continuing to be sent to the Justice Department and to the ABA Committee as required by DOJ.

8. At the behest of the DOJ, the ABA Committee has undertaken and continues to undertake investigations and evaluations of prospective judicial nominees in order to advise DOJ of the suitability of the candidate to be a judge.

9. In the course of performing its advisory functions, the ABA Committee has secretly met with, consulted and solicited the views of, and continues to secretly meet with, consult and solicit the view of, selected liberal political organizations or their representatives including People for the American Way, the Alliance for Justice Judicial Selection Project, the American Civil Liberties Union, the NAACP, the NationalOrganization for Women, the Center for Law and Social Policy, and other groups opposed to the appointment of conservative candidates to the federal judiciary.

10. At least since the election of President Reagan in 1981, the ABA Committee has investigated and continues to investigate the judicial candidate's political and ideological philosophy in cooperation with one or more groups referred to in ¶9. Investigations have been conducted and are continuing to be conducted in such a way as to penalize or discredit candidates who hold or profess conservative principles or ideology, and to delay or prevent their nomination by the President.

11. The ABA Committee has secretly met with and continues to meet secretly with one or more representatives of the defendant Department of Justice to provide them with advice or recommendations on the judicial selection process including advising the Justice Department on the qualifications of applicants for a federal judgeship.

12. If the advice or recommendation referred to in ¶11 indicates that the candidate is not considered qualified to be a judge by the ABA Committee or is otherwise viewed as unfavorable, the DOJ relies on that advice by removing the candidate's name from further consideration.

13. If the advice or recommendation referred to in ¶11 is favorable, the candidate's name is forwarded by DOJ to the President of the United States for nomination, and by and with advise and consent of the Senate, appointment as a federal judge.

14. The ABA Committee has opposed or supported and continues to oppose or support judicial candidates for nomination and appointment as authorized by the ABA By-laws and other governing documents.

15. On September 30, 1985, plaintiff sent a letter to the Chairman of the ABA Committee, Robert B. Fiske, Jr. requesting the names of all those federal judicial candidates being reviewed by the Committee in order that plaintiff could participate in the judicial selection process and to ensure the fairness of the proceedings. See Exhibit A. Those names have been and are currently being provided by the ABA defendants to the liberal groups as noted in ¶9.

16. Having failed to receive a reply to the September 30 letter, plaintiff sent a second letter on October 18, 1985 to defendant Fiske and to defendant William W. Falsgraf, President of the ABA reiterating itsprior request of September 30th. In addition, plaintiff requested that the Committee provide plaintiff with the reports and minutes of all meetings of the Committee held during the last two years where judicial candidates were discussed and considered, as well as to inform it of the date and place of all future meetings. See Exhibit B.

17. On November 21, 1985, almost a month later without receiving any substantive response or further correspondence or communication from Fiske or other ABA representatives, plaintiff sent a third letter to Messrs. Fiske and Falsgraf reiterating the requests made in the September 30, 1985 and the October 18, 1985 letters. Exhibit C. Plaintiff further requested that the Committee provide it with any and all reports, memoranda, or other documents relating to the Committee's evaluation of Professor Lino Graglia, who was then under consideration for a federal judgeship. Plaintiff further stated that the information requested was disclosable under the Federal Advisory Committee Act of 1972.

18. On November 27, 1985, Fiske wrote a letter to plaintiff stating that the Committee would not comply with plaintiff's requests. See Exhibit D.

19. Since November 27, 1985, WLF has contacted DOJ and has attempted to get DOJ to comply with FACA with

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

9 - 10

35. The records requested by plaintiff are required by FACA to be disclosed by the defendant.

36. Unless the Court provides plaintiff the relief it seeks, the defendant will continue to deny plaintiff access to the requested records.

WHEREFORE, plaintiff prays that his Court enter an order:

(a) declaring that the ABA Standing Committee on Federal Judiciary is a federal advisory committee within the meaning of section 3(2) of the Federal Advisory Committee Act;

(b) declaring under 5 U.S.C. § 706 that the defendant Department of Justice's utilization of the ABA defendants as an advisory committee is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and is without observance of procedure required by law;

(c) preliminarily and permanently enjoining the defendant Department of Justice from utilizing the ABA Committee as an advisory committee, until such time that all the provisions of the Federal Advisory Committee Act, and 41 C.F.R. Subpart 101-6.10 are complied with including providing public notice of future meetings;

(d) enjoining the defendant to assemble and provide plaintiff with all documents requested;

(e) awarding plaintiff its costs and disbursements, including reasonable attorneys' fees; and

(f) granting plaintiff such other and further relief as may be just and proper.

Respectfully submitted,

/s/_____
DANIEL J. POPEO

/s/_____
PAUL D. KAMENAR
#914200
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.

Washington, D.C. 20036
(202) 857-0240
Attorneys for Plaintiff

DATE: October 21, 1986

EXHIBIT A C.A. No. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

September 30, 1985

Robert B. Fiske, Jr.
Chairman
Standing Committee on the
Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Mr. Fiske:

According to an article titled "Conservatives Pressing to Reshape Judiciary," which appeared in the September 7 issue of Congressional Quarterly Weekly Report, (copy enclosed), your committee informs the Judicial Selection Project Director, Susan Liss, of persons under consideration by the administration for appointment as federal judges. The article quoted Liss as stating that her group seeks to sidetrack certain potential appointees before they are formally nominated, since "it is very hard to stop a nomination once the name goes to the Judiciary Committee."

The article further indicated that member groups of the Judicial Selection Project such as the NAACP Legal Defense Fund then may conduct their own investigations and send information to the ABA. In addition, I also understand that the ABA sends names of potential appointees to the Alliance for Justice.

The Washington Legal Foundation (WLF) is a non-profit public interest law center with over 200,000 members and supporters throughout the nation. WLF is active in a variety of litigation and regulatory matters as well as the issues of judicial reform, judicial accountability, and judicial qualifications.

I respectfully request that you henceforth provide WLF with the names of persons whom your committee has been informed are under consideration for federal judicial appointments. I further ask that these names be provided promptly once your committee receives them.

Since your committee already provides these names to other groups, WLF's request should not cause any hardship on your committee's reviewing process. Moreover, WLF's purpose in requesting these names is precisely the same as that stated by Ms. Liss in the article: to inform interested groups, which may then provide information to your committees.

Please forward the list of all names currently under review by your committee, and all future such lists, to me at the address above.

I appreciate your consideration and look forward to a prompt and favorable response to this request.

Respectfully submitted,

/s/
Alan Slobodin
Assistant General Counsel

AS:jab

cc: William W. Falsgraf

[Congressional Quarterly Weekly Report,
Sept. 7, 1985 at 1759-63 omitted from printing]

EXHIBIT B CA No. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

October 18, 1985

William W. Falsgraf
President
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611

Robert B. Fiske, Jr.
Chairman
Standing Committee on the
Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Gentlemen:

On September 30, 1985, our office sent you a letter requesting that your committee provide us with the names of all those federal judicial nominees being reviewed by the ABA to determine their fitness for office. To date, we have not heard from you.

On behalf of the Washington Legal Foundation, I hereby again request that you provide us with the names of all the judicial nominees that are now under consideration or will be under consideration for judicial appointments. In addition, we request that you provide us with the reports and minutes of all meetings of your committee held during the last two years where judicial nominees were discussed and considered, as well as inform us of the date and place of all future meetings.

Sincerely yours,

/s/
Paul D. Kamenar
Executive Legal Director

PDK:jab

EXHIBIT C CA NO. 86-2883

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
202-857-0240

November 21, 1985

William W. Falsgraf
President
American Bar Association
750 North Lake Shore Drive
Chicago, Il 60611

Robert B. Fiske, Jr.
Chairman
Standing Committee on the
Federal Judiciary
American Bar Association
#1 Chase Manhattan Plaza
Room 4220
New York, NY 10005

Dear Gentlemen:

This letter is a follow-up letter to ours dated September 30, 1985 and October 18, requesting records and information from the Standing Committee regarding the federal judicial selection and evaluation process. As of this date, we have yet to receive any substantive response.

We hereby reiterate our request for the information set forth in our prior letters and further request that your committee provide us with any and all reports, memoranda, or other documents relating to your committee's evaluation of Professor Lino Graglia, whom we understand is under consideration for a federal judgeship.

We expect a prompt response to our requests inasmuch as your committee is subject to the Federal Advisory Committee Act of 1972, 5 U.S.C. App. I.

Sincerely yours,

/s/
Paul D. Kamenar
Executive Legal Director

PDK:jab

[Exhibit D CA No. 86-2883]

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

November 27, 1985

Mr. Paul D. Kamenar
Executive Legal Director
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036

Dear Mr. Kamenar:

As I told you in our telephone conversation this morning, our Committee has carefully considered your request, as well as that of other organizations, that we provide you with the names of the candidates for federal judgeships that are given to us for evaluation by the Justice Department and have discussed this matter with William W. Falsgraf, current President of the American Bar Association. For the reasons that follow in this letter, we have concluded that we cannot comply with this request.

As you know, the Standing Committee on Federal Judiciary of the American Bar Association has been consulted by every Administration with respect to almost every federal judicial appointment since 1952. The Committee never proposes candidates for the federal judiciary, believing that to do so would compromise its evaluative function. Rather it considers prospective nominees referred to it by the Department of Justice. Further, the Committee restricts its review to issues bearing on professional qualifications. Other entities, such as nominating commissions, the President and the Senate may consider other aspects of the prospective nominee's qualifications.

In conducting its investigations, the Committee examines the available legal writing of the prospective nominee and conducts a large number of confidential interviews with judges, law professors, and a representative number of lawyers in the nominee's community, including attorneys from different sized offices, attorneys who practice in different fields of law, government attorneys, women attorneys and attorneys who are members of various minority groups.

A primary concern of the Committee in connection with its investigation of prospective nominees is confidentiality. The nomination process is a Presidential function, and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination. It is also important that prospective nominees not ultimately nominated should be spared as much embarrassment as possible resulting from the Committee's investigation.

In reexamining its operating procedures, the Standing Committee has concluded that a practice of furnishing lists of prospective nominees to organized groups is inconsistent with its concerns for confidentiality and obligations to the President. Moreover, it is very difficult to distinguish between groups in a way that would not create great dissatisfaction among a group that was excluded if others were included. Accordingly, the Committee will no longer furnish lists of prospective nominees to any organization but rather will follow its long-standing investigative procedures for gathering the information which it needs in order to make an informed judgment as to a candidate's qualifications.

We wholeheartedly believe that widespread public input is important, in fact, vital to the judicial selection process. The process now permits such input after the nomination has actually been amde and sent to the Senate. If the process is to be modified and lists of prospective nominees are to be furnished to everyone interested in the judicial selection process prior to nominations being made, the decision to do so should be made by the executive branch of the government. Our present understanding is that the executive branch, which provides us with

the names on a confidential basis, does not want such a process to occur at this stage of the judicial selection process.

For similar reasons, we must decline your other requests. It has been generally recognized since 1972 that our Committee is not covered by the provisions of the Federal Advisory Committee Act. Reports on the evaluation of candidates and minutes of meetings during which judicial nominees were discussed are highly confidential and have never been provided to any outside group. To make such reports publicly available would seriously impair, if not destroy, the effectiveness of the Committee's work.

Sincerely yours,

/s/
ROBERT B. FISKE, JR.
Chairman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff,	)
v.	) Civil Action No. 86-2883) (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)

DECLARATION OF STEVE A. MATTHEWS

I, Steve A. Matthews, do declare and say as follows:

1. I am a Deputy Assistant Attorney General, Office of Legal Policy, United States Department of Justice. Pursuant to my official responsibilities, I am personally familiar with the process by which the President exercises his constitutional power of appointment and with the involvement of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") and the ABA Committee members in that process.

2. In the exercise of his authority to nominate candidates for certain public offices, including judgeships in the Article III courts, the President relies upon information made available to him by private citizens, public officials, and government agencies. Such information assists the President first in defining the field of possible nominees, and ultimately in reaching the decision as to which individuals to appoint, subject to the advice and consent of the United States Senate.

3. The Attorney General of the United States and his designees provide such assistance and advice to the President as the President in his discretion deems necessary and appropriate for the proper discharge of his Article II responsibilities. In this capacity, the Attorney General acts as an adviser to the President. To assist the President in his selection of judicial nominees, the Attorney General and his designees have acted

to gather certain information about particular individuals who may be considered for nomination and appointment. While the Attorney General and his designees have the task of assembling the necessary information and making recommendations to the Presidentthereupon, the decision of whom to nominate for such federal judgeships remains solely within the personal authority of the President.

4. One of the sources of information and advice gathered by the Attorney General and his designees for use in advising the President in the exercise of his sole constitutional nomination and appointment power is the evaluations of the qualifications of proposed judicial candidates by the ABA Committee on Federal Judiciary. The Attorney General considers the ABA evaluations in making his own recommendations to the President regarding potential nominees, and serves as a conduit for such evaluations to the President.

5. The ABA Committee is independent of the federal government and is not supported with federal funds.

6. The following is an outline of the role of the ABA Committee and its evaluations in the President's judicial nomination process.

7. Potential nominees for appointment to the judiciary are selected by the President's federal judicial selection committee made up of immediate advisers to the President, including the Attorney General; the Counsel to the President; the Deputy Attorney General; the Counselor to the Attorney General; the Assistant Attorney General, Office of Legal Policy, working with the Deputy Attorney General's office, notifies candidates of their selection, requests candidates to complete a Personal Data Questionnaire, and directs candidates to provide the information requested on that questionnaire to the Chairman of the ABA Committee, to the Committee's representative for the relevant federal circuit and to the Assistant Attorney General, Office of Legal Policy. The Assistant Attorney General requests the ABA Committee to undertake investigations and evaluations of the qualifications of the proposed nominees and to provide formal reports of the Committee to the Assistant Attorney General.

8. Pursuant to this authorization, the Assistant Attorney General, Office of Legal Policy, working with the Deputy Attorney General's office, notifies candidates of their selection, requests candidates to complete a Personal Data Questionnaire, and directs candidates to provide the information requested on that questionnaire to the Chairman of the ABA Committee, to the Committee's representative for the relevant federal circuit and to the Assistant Attorney General, Office of Legal Policy. The Assistant Attorney General requests the ABA Committee to undertake investigations and evaluations of the qualifications of the proposed nominees and to provide formal reports of the Committee to the Assistant Attorney General.

9. On occasion, after completion of an initial evaluation and report to the ABA Committee Chairman by the ABA Committee's designee conducting the investigation (usually the ABA Committee member in the circuit to which a proposed nomination relates), discussion concerning the results of the evaluation may occur, generally via telephone between the ABA Chairman and/or the investigating ABA Committee designee and Department of Justice officials, including the Assistant Attorney General, Office of Legal Policy or a Deputy Assistant Attorney General, Office of Legal Policy.

10. Upon completion of a final investigation report by the investigating designee and circulation of the report to the ABA Committee Chairman and members, a final rating of a proposed nominee is determined by the ABA Committee; and the Assistant Attorney General, Office of Legal Policy is then notified of that rating and whether it was supported by a majority, a substantial majority or unanimous vote of the ABA Committee.

11. The ABA Committee's ratings of proposed nominees are considered by the Attorney General along with other information, including investigation reports by the Federal Bureau of Investigation, candidates' financial declarations, and medical reports, in determining whether to recommend potential nominees to the President. If the net result of these considerations is positive, the Attorney General will recommend a candidate to the President, through a letter to the President which recites the ABA Committee's evaluation of the candidate.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 18 December 1986 /s/_____
STEVE A. MATTHEWS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION 1705 N Street, N.W. Washington D.C. 20036, Plaintiff, and PUBLIC CITIZEN 2000 P Street, N.W. Washington D.C. 20036, Plaintiff-Intervenor, v. DEPARTMENT OF JUSTICE 10th & Pennsylvania Avenue, N.W. Washington D.C. 20530, Defendant.	)	Civil Action No. 86-2883 Judge Joyce Hens Green

COMPLAINT OF PLAINTIFF-INTERVENOR PUBLIC CITIZEN
FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action seeks declaratory and injunctive relief under the Federal Advisory Committee Act (the "FACA"), 5 U.S.C. App. I, and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551 et seq., from defendant Department of Justice's utilization of the American Bar Association Standing Committee on the Federal Judiciary (the "ABA Committee") without complying with the requirements of the FACA.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PARTIES

3. Plaintiff-intervenor Public Citizen is a non-profit, public interest organization, which was founded by Ralph Nader in 1971 and which currently has a membership of approximate-

ly 70,000. One of Public Citizen's primary objectives is to increase government accountability through open government laws such as the FACA. In furtherance of this objective, Public Citizen engages in public education, lobbying, and litigation under the FACA. Public Citizen has participated in manyof the most significant cases that have been litigated under the FACA, and its effectiveness in many areas is dependent on its access to advisory committees and their documents. Public Citizen also has a significant interest in the federal judiciary, and the process by which federal judges are chosen, because it regularly brings cases in the federal courts on behalf of itself and others.

4. Defendant Department of Justice is an agency of the United States within the meaning of 5 U.S.C. § 551(1) and 5 U.S.C. App. I, § 3(3). It has utilized and continues to utilize the ABA Committee in the interest of obtaining advice and recommendations on the professional qualifications of persons under consideration for nomination to the federal courts.

FACTS

5. Since 1948, the Department of Justice has regularly utilized, and it continues to utilize, advice from the ABA Committee on the professional qualifications of potential nominees for federal judiciary positions.

6. The Justice Department initiates the advisory process by forwarding to the ABA Committee the names of possible nominees for federal judicial posts. The ABA Committee undertakes investigations and evaluations of prospective judicial nominees in order to advise the Department of Justice on the candidates' suitability for judicial positions. After it has concluded its evaluation, the ABA Committee assigns one of four ratings to the candidate: "exceptionally well qualified," "well qualified," "qualified," or "not qualified." The ABA Committee informs the Justice Department of the rating assigned to each candidate.

7. The Department of Justice then utilizes the ABA Committee's evaluations and ratings in deciding whether to recommend potential nominees to the President.

CAUSE OF ACTION

8. The ABA Committee is a federal advisory committee as that term is defined in section 3(2) of the FACA, because defendant Department of Justice is, and has been, utilizing it in the interest of obtaining advice and/or recommendations.

9. Public Citizen wishes to gain access to more information regarding the ABA Committee, including the role assigned to the Committee by the Justice Department and the general criteria and procedures used by the Committee in evaluating possible judicial nominees, butsuch information is not currently available to Public Citizen because the Justice Department is not complying with the FACA.

10. The Justice Department has not complied with any of the FACA's requirements in its utilization of the ABA Committee as an advisory committee, and it will not comply with the FACA's requirements in the future unless ordered to do so by this Court.

WHEREFORE, plaintiff prays that this Court enter an order:

(a) declaring that the Justice Department's utilization of the ABA Committee is covered by the FACA, and ordering the Department of Justice to comply with the FACA's requirements when it utilizes the ABA Committee in the future;

(b) awarding plaintiff-intervenor its costs and disbursements, including reasonable attorneys' fees, in this action; and

(c) granting plaintiff-intervenor such other and further relief as the Court deems proper.

Respectfully submitted,

/s/_____
Eric R. Glitzenstein
(D.C. Bar No. 358287)

/s/_____
Patti A. Goldman
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Attorneys for Plaintiff-
Intervenor Public Citizen

Dated: February 4, 1987

Plaintiff's Exhibit A
Civ. No. 86-2883

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff,	)	
v.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)
DEPARTMENT OF JUSTICE, Defendant.	)	

AFFIDAVIT OF JOAN CLAYBROOK

I, Joan Claybrook, hereby declare as follows:

1. I am the President of Public Citizen. I am submitting this affidavit in support of Public Citizen's Motion to Intervene in the above-captioned lawsuit.

2. Public Citizen is a non-profit, public interest organization, which was founded by Ralph Nader in 1971. It currently has a membership of approximately 70,000.

3. One of Public Citizen's primary objectives is to increase government accountability through open government laws. In furtherance of this objective, Public Citizen engages in public education, lobbying, and litigation under the Freedom of Information Act, the Government in the Sunshine Act, the Privacy Act, and the Federal Advisory Committee Act.

4. Public Citizen's efforts to improve the federal advisory committee process predate the enactment of the Federal Advisory Committee Act ("FACA"). In 1971, Ralph Nader, former President of Public Citizen, testified before the Senate Subcommittee on Intergovernmental Relations about the need for regulation of the federal advisory committee process.

5. Since the enactment of FACA, Public Citizen has monitored the Act's implementation and served as a resource

on FACA developments. For example, in 1974-1975, Public Citizen Litigation Group undertook a joint project with the Freedom of Information Clearinghouse to examine the problems and issues that have arisen in the early years of FACA, which led to a law review article. B. Tuerkheimer, Veto by Neglect: The Federal Advisory Committee Act, 25 American University Law Review 53 (1975). Similarly, Eric R. Glitzenstein, a staff attorney with Public Citizen Litigation Group, is currently a member of the Federal Bar Association Select Committee on the Federal Advisory Committee Act.

6. Public Citizen has also sought to challenge noncompliance with FACA and to improve the Act's implementation through the courts. Public Citizen's most recent such endeavor was its 1985 lawsuit to subject the Bicentennial Commission to FACA's open meeting requirements. Public Citizen v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 953 (D.D.C. 1985). Aside from the lawsuits that Public Citizen has brought on its own behalf, Public Citizen attorneys have litigated many of the most pivotal FACA cases. See, e.g., National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983); Wolfe v. Weinberger, 403 F. Supp. 238 (D.D.C. 1975); Food Chemical News v. Davis, 378 F. Supp. 1048 (D.D.C. 1974); Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975); Nader v. Dunlop, 370 F. Supp. 177 (D.D.C. 1973).

7. In its work in other areas, Public Citizen is affected by the substantive recommendations of advisory committees. Thus, Public Citizen's effectiveness is often dependent upon its access to advisory committee meetings and documents. For example, Public Citizen recently submitted comments to the Food and Drug Administration's Arthritis Advisory Committee on acute renal failure from the arthritis drug Suprofen. Similarly, Public Citizen has sought access to the documents from the advisory committee that recommended pay increases for congressional representatives, judges, and executive officials as part its involvement in that issue.

8. Public Citizen seeks to intervene in this case in part because the government is urging a very restrictive interpretation of FACA. In particular, the government has put forward a constitutional argument that seeks to limit FACA's applicability to advisory committees that are utilized by the President. If this Court accepts the government's argument, it would have a serious, detrimental impact on the public's rights of access to, and input into, the operation of federal advisory committees.

9. Aside from its interest in FACA, Public Citizen seeks to intervene in this case to protect its significant interest in the federal judiciary. Public Citizen regularly resorts to the federal courts to further the interests of its members. Since 1972, Public Citizen Litigation Group, which currently has a staff of ten lawyers, has been litigating groundbreaking cases in the federal courts. Thus, the criteria and methods used to select federal judges have far-reaching effects on Public Citizen's work.

10. Public Citizen's interests will not be represented by either party to this lawsuit. The government will not represent Public Citizen's interests because it seeks to limit the coverage of FACA in a way that is almost certain to damage our interests in the statutory scheme and in advisory committees. The Washington Legal Foundation will not represent Public Citizen's interests because it seeks more sweeping relief than what we believe is appropriate at this juncture and because its motivation for this lawsuit apparently stems from what it perceives to be an overly "liberal" bias in the utilization of the ABA Standing Committee on the Federal Judiciary.

Pursuant to 28 U.S.C. § 1746 and Local Rule 106(g), I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of February, 1987.

/s/_____

Joan Claybrook

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION, Plaintiff,	)	
v.	)	Civil Action No. 86-2883
	)	(Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	

PLAINTIFF-INTERVENOR'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

In support of plaintiff-intervenor's motion for summary judgment, and inaccordance with Local Rule 1-9(i), plaintiff-intervenor submits that no genuine issue exists as to the following material facts:

1. The Justice Department routinely provides the American Bar Association's Standing Committee on the Federal Judiciary (the "ABA Committtee") with the names of possible nominees for federal judgships and asks the ABA Committee to evaluate the qualifications of those nominees. Washington Legal Foundation v. American Bar Association, Civ. No. 85-3918, slip op. at 2 (D.D.C. Nov. 26, 1986).

2. The Justice Department does not make the names of possible nominees for federal judgships available to the general public.

3. The Justice Department does not ask any outside committees other than the ABA Committee to evaluate the qualifications of possible nominees for federal judgships.

4. The Justice Department utilizes the evaluations prepared by the ABA Committee in making its own recommendations to the President regarding possible nominees for federal judgships. Affidavit of Steven A. Mathews at ¶¶ 4, 11.

5. The Justice Department and the President utilize the recommendations and evaluations of the ABA Committee in determining whether to nominate individuals for federal judgships. Mathews Affidavit at ¶11.

6. After an individual is nominated to be a federal judge, the ABA Committee's rating regarding that individual is made available to the public.

Respectfully submitted,

\s\

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Alan B. Morrison
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February 4, 1987

Attorneys for Plaintiff-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff,	)	
v.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	

[PROPOSED ORDER for Public Citizen's Motion for Summary Judgment]

This matter is before the Court on defendant's motion to dismiss and plaintiff-intervenor's motion for summary judgment. Upon consideration of the parties' arguments and memoranda, as well as the record in the case, it is, by the Court, this day of , 1987

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that plaintiff-intervenor's motion for summary judgment is granted; and it is further

ORDERED that it is DECLARED that the defendant Justice Department utilization of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") is covered by the Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"), and that the defendant Department of Justice must undertake to comply with the requirements of FACA when it utilizes the ABA Committee in the future.

U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff,	)	
v.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

Since the Court may treat defendant's pending motion as one for summary judgment (see F.R.Civ.Pro. 12(b)), and in accordance with Local Rule 108(h), defendant submits that no genuine issue exists as to the following material facts:

1. In fulfilling his Article II authority to nominate candidates for federal Article III judgeships, the President relies upon advice and information from private citizens, government agencies and public officials, including the Attorney General and his designees who provide such advice, information and assistance to the President as the President deems necessary. See Declaration of Steve A. Mathews ¶¶2, 3.

2. The American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") provides advice and information on the qualifications of potential judicial nominees for use by the Attorney General and the President. Id. at ¶¶4, 8-11; see also WLF v. ABA, No. 85-3918, slip. op. at 103 (D.D.C. Nov. 26, 1986).

3. As part of the President's nomination process, the President's federal judicial selection committee, made up of immediate advisors to the President, identifies potential candidates for nomination and authorizes a request to the ABA Committee to evaluate the qualifications of proposed judicial candidates. Mathews Dec. ¶¶2-4, 7-8.

4. The ABA evaluation generally consists of "confidential interviews with lawyers, judges, and professors in the

nominee's community, close scrutiny of the nominee's legal writings, and talks between Committee members and the nominee over the nominee's qualifications." WLF v. ABA, supra, slip. op. at 2.

5. After the investigation is completed, the committee determines a final rating on qualifications and forwards that rating to the Assistant Attorney General, Office of Legal Policy. Mathews Dec. ¶10.

6. The contents of the ABA Committee's report remain confidential. WLF v. ABA, supra, slip. op. at 2

7. The Attorney General considers the ABA evaluations in making his own recommendations to the President regarding potential nominees, and provides the ABA Committee's rating to the President, upon the Attorney General's decision to recommend a candidate. Mathews Dec. ¶¶4, 11.

8. After receiving the necessary information and recommendations, the President makes the decision as to whom to nominate. See Mathews Dec. ¶3.

Respectfully submitted,
RICHARD K. WILLARD
Assistant Attorney General
JOSEPH diGENOVA
United States Attorney
/s/_____
ROBERT J. CYNKAR
Deputy Assistant Attorney General
/s/_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Plaintiff-Intervenor, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)

PLAINTIFF-INTERVENOR'S RESPONSE TO
DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH
THERE IS NO GENUINE DISPUTE

In accordance with Local Rule 108(h), plaintiff-intervenor Public Citizen responds to defendant's statement of material facts as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Plaintiff-Intervenor is without sufficient information to admit or deny the facts in this paragraph but submits that they are not material to resolution of this dispute.

5. Admitted.

6. Plaintiff-Intervenor is without sufficient information to admit or deny the facts in this paragraph but submits that they are not material to resolution of this dispute.

7. Admitted.

8. Plaintiff-Intervenor is without sufficient information to admit or deny whether President actually makes the decision as to whom to nominate but submits that this fact is not material to resolution of this dispute.

Respectfully submitted,
/s/_____
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Attorney for Plaintiff-
Intervenor

Dated: April 6, 1987

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)

PLAINTIFF'S CONDITIONAL RESPONSE TO
DEFENDANT'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE

On March 25, 1987, defendant Department of Justice filed its Opposition to Plaintiff-Intervenor's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss. Although the defendant has not filed a motion for summary judgment, it nevertheless filed, also on March 25, 1987, a Statement of Material Facts As To Which There Is No Genuine Dispute on the contingency that the Court may treat its motion to dismiss, filed on December 22, 1986, as a motion for summary judgment. See F.R.Civ.Pro. 12(b). While the Court has not indicated whether or not it will treat defendant's motion to dismiss as one for summary judgment, the plaintiff nevertheless files this response to the defendant's Statement of Material Facts for the Court's consideration should the Court decide to convert the motion to dismiss into one for summary judgment.

If the Court so decides to treat the defendant's motion to dismiss as one for summary judgment, we request that the Court notify the parties of that decision so that the plaintiff can obtain discovery and provide record evidence before a ruling on the motion is made. See F.R.Civ.Pro. 12(b), 56. In that regard,

plaintiff is filing herewith a Rule 56(f) affidavit on a conditional basis as well.

Accordingly, Washington Legal Foundation responds to defendant's statement of material facts as follows:

1. Admit that the President relies on the advice of the Attorney General in nominating federal judges. Plaintiff is without sufficient information to admit or deny that the President also relies on advice from private citizens and other government agencies and officials or that the advice from the Attorney General and his designees is advice that "the President deems necessary" in exercising his Article II nominating authority. Further, plaintiff denies any implication in this statement that the President has directly solicited the advice of the ABA, or the implication that the President "deems necessary" that advice of the ABA be given to the Attorney General.

Plaintiff further challenges under F.R.Civ.Pro. 56(e) the competency of the declarant Steve A. Matthews, a Deputy Assistant Attorney General within the Office of Legal Policy of the Department of Justice, to testify "on personal knowledge" as required by Rule 56(e) as to what advice the President "deems necessary" to carry out his Article II powers. Accordingly, ¶¶2-3 of the Matthews Declaration must be stricken as incompetent and inadmissible evidence under Rule 56(e), leaving ¶1 of the Defendant's Statement of Material Facts largely without any support in the record.

2. Admit, except that plaintiff submits that the ABA Committee is a preferred source of advice and information to the Attorney General on the qualifications of potential judicial nominees. In addition, the ABA Committee supports or opposes potential nominees. Plaintiff's Complaint ¶14; see Letter of Edward C. Schmults, former Deputy Attorney General, in Wall Street Journal, Jan. 8, 1986 referred to in Plaintiff's Opposition to Motion to Dismiss at 9, n.6.

Plaintiff further submits that with respect to potential nominees who have been initially reviewed and appear "not qualified" under ABA standards, the ABA Committee's advice, information, and recommendations on such candidates are only used by the Attorney General and are never received or

reviewed by the President. See also Defendant's Opposition and Reply Brief at 5 ("the President...generally receives the ABA's recommendation on that issue") (Emphasis added).

3. Admit, except that plaintiff denies that some members of the so-called "President's federal judicial selection committee" is entirely "made up of immediate advisors to the President" as alleged. For example, a Deputy Assistant Attorney General of the Office of Legal Policy within the Justice Department who is listed as being on the committee can hardly be characterized as an "immediate advisor" to the President of the United States. Plaintiff is aware of no Executive Order or similar directive establishing this Presidential committee as there has been of other Presidential committees of an advisory nature.

4. Admit, except that the investigation conducted by the ABA has not been limited to only individuals within the "nominee's community" but has included select individuals and groups outside the community which are national in scope and which are hostile to conservative nominees. Plaintiff's Complaint ¶¶9, 10. Further, the investigation consists not only of the nominee's "qualifications" but also includes highly improper subjects such as the potential nominee's religious beliefs.

In addition, plaintiff denies any implication that all the interviews are strictly "confidential" since the information or views revealed by a source and the reasons for the evaluation rating is selectively released by the ABA Committee to Justice Department officials and other private and public individuals. See ABA Standing Committee on Federal Judiciary: What It Is and How it Works at 9 (1983) ("ABA Committee...makes an extensive report [to the Senate Judiciary Committee on Supreme Court nominees] on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources."); id. at 10 (confidentiality" with respect to the investigation of all potential nominees refers only to the "identities" of "sources" and not the underlying information obtained by the ABA from those sources). See Exhibit A attached hereto.

5. Admit, except that as indicated in ¶9 of the Matthews Declaration, ABA Committee advice, information, and recommendations are sometimes given to DOJ officials before a "final rating" of the candidate is made by the entire ABA Committee. In some cases, a "final rating" by the entire Committee of a potential nominee is never made because the preliminary rating and advice has resulted in the potential nominee's removal from further consideration.

6. Plaintiff is without information to admit or deny the statement in ¶6 since the phrase "ABA Committee's report" is undefined. If the "ABA Committee's report" consists of only the "final rating" referred to in ¶5 of defendant's statement, then plaintiff denies the statement that the rating does "remain confidential" as alleged, because it is publicly released when the nomination is made. Furthermore, as noted in plaintiff's response to ¶4 of Defendant's Statement of Material Facts, additional information concerning the ABA investigation is also selectively released by the ABA Committee.

7. Admit, except that it is unclear whether the President receives the ABA rating in all cases since, as noted in our response to ¶2, the defendant states only that the President "generally" receives the ABA recommendation.

8. Admit that the President technically makes the nomination, but without information to admit or deny whether "the President makes the decision as to whom to nominate" to the extent that the phrase "as to whom" suggests that the name of more than one potential nominee is given to the President from which the nominee is chosen. See ¶7 of Defendant's Statement of Material Facts which only refers to the "Attorney General's decision to recommend a candidate." (Emphasis added). In other words, the President's decision may only be limited to deciding whether to accept or reject the sole nominee given to the President by the Attorney General for a particular judicial post. Thus, if only one name is given to the President for a judicial post and if the President invariably nominates that person, this "decision as to whom to nominate" effectively lies with the Attorney General who, in turn, utilizes the ABA Committee as a preferred source of advice in making his decision.

Significantly, the defendant does not claim in its Statement of Material Facts nor in the Matthews Declaration that declaratory or injunctive relief in favor of the plaintiff would result in any disruption of the judicial nominating process or would interfere in any way with the President's Article II authority. Those vague and unspecific fears have been made only by defendant's counsel in its legal memoranda, but have never been established as fact or supported by any affidavit or other record evidence.

Respectfully submitted,

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[Exhibit A to Plaintiff's Conditional Response
to Defendant's Statement of Material Facts]

STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works
AMERICAN BAR ASSOCIATION
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THE ABA'S STANDING COMMITTEE ON FEDERAL JUDICIARY

What It Is and How It Works

The Standing Committee on Federal Judiciary of the American Bar Association has been consulted by every President with respect to almost every federal judicial appointment since 1952. Moreover, the U.S. Senate through the Senate Judiciary Committee has requested the opinion of the Committee on every federal judicial nomination since 1948.

The Committee never proposes candidates for the federal judiciary, believing that to do so might compromise its evaluative function. Rather, it considers prospective nominees referred to it by the Attorney General. Further, the Committee restricts its review primarily to issues bearing on professional qualifications. Other entities such as nominating commissions, the President, and the Senate may consider other aspects of the prospective nominee's qualifications.

The Committee evaluates the qualifications of persons considered for appointment to the U.S. Supreme Court, the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Court of International Trade. For historical and practical reasons, the Committee's procedures for appointments to the Courts of Appeals, the District Courts, and the other lower federal courts differ from those for Supreme Court nominations and therefore are dealt with separately below.

The Committee consists of fourteen members--two members from the Ninth Circuit, one member from each of the other eleven federal judicial circuits and one member-at-large. The members are appointed for staggered three-year terms by the

President of the ABA. No member serves more than two terms. As a condition of appointment to the Committee, each member agrees not to seek or accept federal judicial appointment while on the Committee and for at least one year thereafter.

I. APPOINTMENTS TO THE DISTRICT COURTS, THE COURTS OF APPEALS AND THE OTHER LOWER FEDERAL COURTS

There are approximately forty vacancies on the Courts of Appeals, the District Courts and the other lower federal courts each year. Though not highly publicized outside the legal profession, the Committee's evaluation of prospective nominees for these courts provides its regular work load.

A. Evaluation Criteria

The Committee's evaluation of prospective nominees to these courts is directed primarily to professional qualifications --competence, integrity and judicial temperament.

In assessing a prospective nominee's professional qualifications, the Committee considers circumstances and factors which range so widely that it would be difficult to provide a comprehensive catalogue. Professional competence encompasses such qualities as intellectual capacity, judgment, writing ans analytical ability, industry, knowledge of the law and professional experience.

As to experience, the Committee believes that ordinarily a prospective appointee to the federal bench should have been admitted to the bar for at least twelve years. Substantial trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate courts and the trial courts. Additional experience which is similar to court trial work--such as appearing before or serving on administrative agencies or arbitration boards, teaching trial advocacy or other clinical law school courses, etc.--is considered in evaluating a prospective nominee's trial experience qualifications. In exceptional cases, when there is significant evidence of distinguished accomplishment in the field of law, an individual with limited trial experience may be found qualified.

In evaluating experience, the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited.

The Committee believes that political activity and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law.

In investigating temperament, the Committee looks to the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors. The prospective nominee's character, integrity and general reputation in the legal community are investigated, as are his or her industry and diligence. Community and professional contributions are considered relevant. Finally, the prospective nominee's health and age are considered. The Committee believes that the public is entitled to the appointment to the federal judiciary of persons who are able to render long and vigorous service. The Committee does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.

The Committee feels that the same fundamental criteria--professional competence, integrity and temperament--should be applied as a starting point for evaluating prospective nominees for the appellate courts and for the trial courts. However, the Committee also believes that an appellate judge should have an unusual degree of overall excellence that would provide an inspiration and an example to trial judges. Without demeaning the scholarly qualities necessary for the trial courts, the Committee nonetheless looks for an especially high degree of scholarship and academic talent in prospective nominees for the appellate courts. The abilities to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases are matters of great concern in the evaluation of prospective nominees for the appellate courts.

Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom), the Committee may place somewhat less emphasis on the importance of extensive trial experience as a qualification for the appellate courts. This same contrast in day-to-day experience may also cause the Committee to evaluate temperament for the appellate courts in slightly different terms.

B. Ratings

The Committee rates prospective nominees on the following scale:

To be rated **Exceptionally Well Qualified**, the prospective nominee must stand at the top of the legal profession in the community involved and have outstanding legal ability, wide experience and the highest reputation for integrity and temperament inaddition to preeminence in the law, the prospective nominee should have a reputation as an outstanding citizen, having made important community and professional contributions in order to merit the sparingly awarded "Exceptionally Well Qualified" evaluation.

To be **Well Qualified**, the prospective nominee must have the Committee's strong affirmative endorsement and be regarded as one of the best available for the vacancy from the standpoint of competence, integrity and temperament.

The evaluation of **Qualified** indicates that it appears the prospective nominee would be able to perform satisfactorily as a federal judge with respect to competence, integrity and temperament.

When a prospective nominee is found **Not Qualified**, it means that the Committee's investigation indicates that the prospective nominee is not adequate from the standpoint of competence, integrity or temperament.

C. The Investigation

After a judicial vacancy occurs and prior to any nomination to that vacancy, the Chairman of the Committee receives one or more names of prospective nominees for evaluation from the office of the Attorney General. The investigation of the prospective nominee is usually assigned to the circuit member

of the Committee in the judicial circuit in which the judicial vacancy exists, although it may be conducted by another member, a former member or a former chairman. (The individual making the investigation is hereinafter referred to as the "circuit member.")

To each prospective nominee the Attorney General's office sends a comprehensive ABA-designed questionnaire (called a Personal Data Questionnaire) that seeks wide-ranging information related to fitness for judicial service. The responses are sent to the U.S. Department of Justice, the ABA Committee Chairman and the circuit member. Receipt of this document is usually the starting point for the investigation. The circuit member makes extensive use of it in his or her investigation. The prompt, thorough and accurate preparation of a response to the Personal Data Questionnaire by the prospective nominee is extremely important to the investigation.

The circuit member examines the available legal writing of the prospective nominee and conducts a large number of confidential interviews with judges, lawyers, law professors and others who are in a position to evaluate the prospective nominee's competence, integrity and temperament. The circuit member interviews a representative sample of the profession in the community, including attorneys from different sized offices, attorneys who practice in different fields of law, law professors and deans, judges of different courts, government attorneys, legal services and public interest attorneys, women attorneys and attorneys who are members of various minority groups. Spokespersons of professional organizations including those representing women and minorities are also contacted. In addition, representatives of groups involved in the selection or evaluation of prospective nominees for the federal judiciary are interviewed.

Sometimes a clear pattern emerges early in the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations as to competence may be received, or questions may arise as to integrity or temperament. In those instances, the circuit member pursues the leads and problems as necessary to reach a fair and accurate assessment of the prospec-

tive nominee. This may involve a large number of interviews and other investigations. For example, the examination of trial transcripts and other relevant records.

A meeting of the circuit member, and in appropriate cases one or more other members of the Committee, is held with the prospective nominee. During the interview the circuit member raises any adverse information discovered during the investigation and discusses it with the prospective nominee. The prospective nominee is given a full opportunity to explain the matter and to provide any additional information bearing on it. The circuit member also discusses with the prospective nominee his or her qualifications for a judgeship. The circuit member may need to conduct additional interviews in order to complete this stage of the investigation.

The circuit member then prepares a written informal report to the Chairman containing a description of the prospective nominee's background, summaries of all interviews conducted including the interview with the prospective nominee, an evaluation of the prospective nominee's qualifications and a recommended rating after receiving the report and discussing it with the circuit member, the Chairman makes an informal report to the Attorney General's office. While protecting the confidentiality of those interviewed, the Chairman passes on the substance of the report and gives a tentative evaluation--indicating that, if a formal report is requested, the prospective nominee will probably be found "Exceptionally Well Qualified," "Well Qualified," "Qualified" or "Not Qualified."

If the office of the Attorney General requests the Committee to prepare a formal or final report, the circuit member completes the investigation as necessary. The circuit member then sends a written formal report to all members of the Committee together with the response to the Personal Data Questionnaire and any other materials thought relevant by the circuit member. After studying the formal report and its enclosures, each member sends a vote to the Chairman. If questions are raised, the Committee may discuss the prospective nominee by telephone conference call or at a meeting.

The Chairman confidentially reports the Committee's rating to the office of the Attorney General. If the Committee has been unanimous in its rating, the report so states. Otherwise the report reflects the rating given by a majority or substantial majority of the Committee. If questions concerning the health of the prospective nominee have been raised during the investigation, the Committee's rating may be conditioned upon the prospective nominee's undergoing an independent medical examination.

If the President nominates the prospective nominee, a public hearing is held by the Senate Judiciary Committee as the beginning of the confirmation process. At the request of the Senate Judiciary Committee, the ABA Committee submits its rating for the public record and at the same time notifies the nominee of its rating. Until this state of the process, the Committee does not make its rating public unless authorized to do so by the Attorney General.

If the Committee has found a prospective nominee "Not Qualified," the question arises whether the President will nominate the prospective nominee. Only in rare instances--less than 1 percent of the nominations--has a President decided to nominate a person found "Not Qualified" by the Committee. In those circumstances, the Committee will oppose the nomination in such ways as may be appropriate under the circumstances.

II. APPOINTMENTS TO THE SUPREME COURT

It is extremely important to the Committee's effective evaluation of prospective Supreme Court nominees that it be given sufficient time to evaluate them in depth. The procedures described below have been followed recently and have allowed the Committee to afford significant assistance to the President in selecting a well-qualified appointee.

A. Evaluation Criteria and Ratings

The Committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications--their professional competence, judicial temperament and integrity. Whilethe same factors considered with respect to the lower federal courts are relevant to an appointment to the

Supreme Court, the Committee's investigation is based on the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court, the importance of the underlying societal problems, the need to mediate between tradition and change and the Supreme Court's extraordinarily heavy docket are among the factors which require a person of exceptional ability. To fulfill the responsibilities of a Supreme Court Justice, it is not enough that one be a fine person or a good lawyer.

The Committee's highest evaluation of a prospective nominee to the Supreme Court--Well Qualified--is reserved for those who meet the highest standards of professional competence, judicial temperament and integrity. The persons in this category must be among the best available for appointment to the Supreme Court.

The second category consists of those persons who are Not Opposed by the Committee. Such a person, while minimally qualified, is among the best available for the appointment and is not endorsed by the Committee.

The third category consists of those who are **Not Qualified** with respect to professional qualifications for appointment to the Supreme Court.

B. The Investigation

The Committee's procedures in evaluating a prospective nominee are described below.

1. Members of the Committee across the nation interview those likely to have information regarding the professional competence, integrity and temperament of the person under consideration. Those interviewed include federal and state court judges and their law clerks, a cross-section of practicing lawyers, government lawyers, legal services and public interest lawyers, law school professors and deans, officials of professional organizations and spokespersons representing women, minorities, the indigent, ethnic groups and other interest groups.

2. A team of law school professors examines the legal writing (opinions, briefs and articles) of the prospective nominee. Customarily, this task is accomplished by dividing the material

into subject matter categories and having it read by professors who are expert in those areas. The law school teams are usually under the direction of a senior professor who reports the findings to the Committee. This aspect of the investigation, like the investigation as a whole, is intended to weigh professional competence, not to assessthe ideology of the prospective nominee.

3. A team of practicing lawyers (which may include former Supreme Court law clerks) also examines the legal writings of the prospective nominee as a valuable cross-check on the academic evaluation.

4. Committee members discuss the prospective nominee with a number of the most highly respected law school deans and with the Chief Judges of the Circuits and other judges.

The results of the foregoing inquiries, together with the results of comparable investigations of other prospective nominees, are reported to the full Committee for discussion and evaluation. These sessions are lengthy and searching and frequently result in additional investigation.

The Committee's ratings of prospective nominees are reported in confidence to the Attorney General. Further evaluation and reports may be provided as the President approaches a choice.

Once the President has made a nomination, the Senate Judiciary Committee holds confirmation hearings. At the Senate Judiciary Committee's hearings, a spokesperson for the ABA Committee appears and makes an extensive report on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources. The Committee may submit a follow-up report to the Senate Judiciary Committee or to the Senate as a whole if new information is developed during the course of the hearing which warrants comment or evaluation by the ABA Committee.

III. CONFIDENTIALITY

A persistent concern of the Committee in connection with its investigation of prospective nominees is confidentiality. This is particularly true with respect to Supreme Court appointments. A Supreme Court nomination is an event of substantial

national interest, and from the moment the vacancy occurs, many of the nation's most able reporters are assigned to it.

The Committee seeks information on a confidential basis. No member of the Committee discloses the name of anyone under investigation except to those being interviewed or assisting in the investigation, who are asked to keep the information confidential. It is, however, inevitable that an extensive investigation will result in public identification of the prospective nominee. Such public knowledge is usually not harmful and may be beneficial in some circumstances in that itencourages investigation into the background and personal history of the prospective nominee by other persons. It is in the public interest to avoid an appointment without full information about the appointee.

Public disclosure of the Committee's evaluation prior to its report to the Senate Judiciary Committee after the nomination has been made is more serious. The nomination process is a Presidential function, and the President should be able to obtain a confidential assessment of prospective nominees as an aid in making the nomination. Moreover, prospective nominees not ultimately nominated should be spared any embarrassment resulting from the Committee's evaluations.

In investigations involving both the Supreme Court and the other federal courts, it is essential that the Committee assure its sources that their identities will not be revealed outside of the Committee. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information.

IV. CONCLUSION

Through the cooperation of the executive and legislative branches of our government, the ABA's Standing Committee on Federal Judiciary has been able to play a useful role in helping to promote a better federal judiciary. The Committee constantly seeks to learn from its experiences and to refine and improve its standards and procedures. To this end, the Committee welcomes suggestions from members of the bar and the public.

[List of Members of ABA Committee omitted from printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)

AFFIDAVIT OF PLAINTIFF
PURSUANT TO F.R.CIV.PRO. 56(f)

I, Paul D. Kamenar, do declare and say as follows:

1. I am the Executive Legal Director of the Washington Legal Foundation, the plaintiff in this case. I submit this affidavit pursuant to F.R.Civ.Pro. 56(f) should the Court decide to convert the defendant's motion to dismiss to one for summary judgment under F.R.Civ.Pro. 12(b). Under Rule 56(f), the Court can either "refuse the application for [summary] judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." F.R.Civ.Pro. 56(f) (emphasis added). While we submit that there is more than ample grounds to refuse or deny the defendant's converted motion, we request, in the alternative, a continuance to permit discovery to be had for the following reasons:

2. To the extent that the defendant (or this Court) regards it to be a material fact in ¶1 of Defendant's Statement of Material Facts that the President "deems necessary" that the Attorney General receive the advice of the American Bar Association, or any implication that the application of all or part of the Federal Advisory Committee Act to the ABA would prevent

the Attorney General from receiving the ABA's advice, plaintiff is unable to oppose this statement without taking discovery of the defendant who is in possession of this information, including the declarant Steve A. Matthews. Such discovery is needed to determine and rebut the factual basis for this position.

3. To the extent that it is a material fact in ¶¶4 and 6 of defendant's Statement that the ABA's investigation and evaluation is or remains "confidential," or any implication that such confidentiality is essential to the nominating process, plaintiff is unable to fully oppose this statement without discovery of the defendant and/or the ABA Committee to determine and rebut the factual basis for this assertion. As noted in ¶4 of Plaintiff's Response to Defendant's Material Facts, the ABA considers "confidentiality" to refer only to the sources of information and not the underlying information obtained from the source, suggesting that there may be no incompatibility of the Federal Advisory Committee Act with the ABA evaluation process.

4. To the extent that other facts in defendant's Statement are material which plaintiff indicated it was unable to admit or deny, the information concerning the factual basis of those assertions are largely in the hands of the defendant.

5. While plaintiff is prepared to take discovery of the defendant, the ABA Committee, and others, plaintiff is reluctant to do so at this juncture since the Court may feel it can decide the pending motions without any discovery. In addition, when plaintiff attempted to take discovery in the earlier related case, Washington Legal Foundation v. American Bar Association, No. 85-3918 (D.D.C. Nov. 26, 1986), this Court stayed all discovery because "[d]iscovery at this point in the proceedings [was] premature." See WLF v. ABA, supra, Order of February 3, 1986.

6. Accordingly, should the Court convert the government's motion to dismiss into one for summary judgment, the motion should be denied, or, in the alternative, a continuance should be ordered so discovery may be had.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 30, 1987

/s/

PAUL D. KAMENAR
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[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883-JHG

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In accordance with Local Rule 108(h), plaintiff submits that no genuine issue exists as to the following facts:

1. The Justice Department routinely provides the American Bar Association's Standing Committee on Federal Judiciary (the "ABA Committee") with the names of possible nominees for federal judgeships and asks the ABA Committee for its advice on the suitability and qualifications of those nominees. See The ABA's Standing Committee on Federal Judiciary: What It Is and How It Works 1 (1983) ("ABA Brochure").

2. The Justice Department does not make the names of possible nominees for federal judgeships available to the general public.

3. The Justice Department does not ask any outside committees other than the ABA Committee for advice on the suitability and qualifications of possible nominees for federal judgeships.

4. As an integral part of the judicial selection process, the Justice Department requires all applicants for federal judgeships to complete a Personal Data Questionnaire which

was designed by the ABA Committee. See ABA Brochure at 5.

5. The Justice Department utilizes the advice of the ABA Committee in making its own recommendations to the President regarding possible nominees for federal judgeships. Affidavit of Steven A. Matthews at ¶¶4, 11.

6. If the ABA Committee advises the Department of Justice that a nominee is "not qualified," that evaluation almost always results in the removal of that nominee by the Justice Department from further consideration. See ABA Brochure at 7.

7. The Justice Department utilizes the recommendations and evaluations of the ABA Committee in determining whether individuals for federal judgeships should be nominated. Matthes Affidavit at ¶11.

8. After an individual is nominated to be a federal judge, the ABA Committee's rating regarding that individual is made available to the public.

9. The reasons for the ABA Committee's rating and other information obtained during the course of the ABA Committee's investigation of a potential nominee is not always strictly confidential, but is sometimes revealed to the Department of Justice, the Senate Judiciary Committee, or other individuals. See ABA Brochure at 9-10.

10. The names of the potential nominees have been given by the ABA Committee to various individuals, groups, and organizations before the ABA Committee has completed its evaluation of those nominees. See Correspondence between WLF and ABA Committee Chairman Robert Fiske, Jr. attached as Exhibits A-D of Plaintiff's Complaint.

Respectfully submitted,

/s/_____
DANIEL J. POPEO

/s/_____
PAUL D. KAMENAR
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1705 N Street, N.W.
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(202) 857-0240

Date: May 12, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Intervenor-Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)

[PROPOSED ORDER for Washington Legal Foundation's Alternative Motion for Summary Judgment]

This matter is before the Court on defendant's motion to dismiss which the court has converted into a motion for summary judgment, and plaintiff and plaintiff-intervenor's cross-motions for summary judgment. Upon consideration of the parties' arguments and memoranda, as well as the record in the case, it is, by the Court, this ___ day of ____, 1987

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff and plaintiff-intervenor's cross motions for summary judgment are granted; and it is further

ORDERED that it is DECLARED that the defendant Justice Department utilization of the American Bar Association Standing Committee on Federal Judiciary ("ABA Committee") is covered by the Federal Advisory Committee Act, 5 U.S.C. App. I ("FACA"), and that the defendant Department of Justice must undertake to comply with the requirements of FACA when it utilizes the ABA Committee in the future.

_____

U.S. District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION Plaintiff, and PUBLIC CITIZEN Intervenor-Plaintiff v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	)	Civil Action No. 86-2883-JHG

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

In accordance with Local Rule 108(h), defendant submits the following response to plaintiff's statement of material facts filed with the Court on May 12, 1987. In so responding the defendant does not concede the materiality of any of plaintiff's statements, or that plaintiff has complied with the requirements of Fed.R.Civ.Pro. 56 and Local Rule 108(h) with regard to record support of those statements.

1. Admitted. Defendant refers the Court to the December 18, 1986 Declaration of Steve A Matthews ¶¶ 3-8 (filed with defendant's December 22, 1986 Motion to Dismiss) for details regarding the request for ABA Committee evaluation of qualifications of potential candidates for Article III federal judgeships.

2. Admitted.

3. Admitted.

4. Defendant admits paragraph 4 to the extent that the potential nominee for Article III federal judgeships are re-

quested to complete a Personal Data Questionnaire (see Matthews Dec. ¶¶2, 8) which was designed by the ABA.

5. Defendant admits paragraph 5 to the extent that it is consistent with the cited Matthews Declaration which indicates that the ABA Committee's evaluations are considered by the Attorney General in making his own recommendations to the President regarding potential judicial nominees, and are provided to the President upon a determination by the Attorney General to recommend particular candidates to the President for nomination. Matthews Dec. ¶¶4, 11.

6. Defendant denies paragraph 6 to the extent it is not supported by the cited reference to the ABA Brochure, which states only that: "Only in rare instances--less than 1 percent of the nominations--has a President decided to nominate a person found 'Not Qualified' by the Committee," (ABA, Standing Committee on Federal Judiciary: What It Is and How It Works 7 (1983) ("ABA Brochure") (attached as Exh. A to Plaintiff's Conditional Response to Defendant's Statement of Material Facts filed April 30, 1987)), and defendant admits only that most candidates for nomination which have received a "not qualified" rating by the ABA Committee have not been recommended by the Attorney General for nomination by the President. Defendant refers the Court to paragraph 11 of the Matthews Declaration regarding the factors considered by the Attorney General in making his recommendations to the President.

7. Defendant denies plaintiff's characterizations in paragraph 7 to the extent they are inconsistent with the cited Matthews Declaration which indicates that the ABA Committee's ratings of proposed nominees are considered by the Attorney General in making his determinations whether to recommend potential nominees to the President, but that the decision as to whether to nominate a candidate is made by the President. Matthews Dec. ¶¶3, 11.

8. Defendant denies plaintiff's unsupported statement in paragraph 8 except to admit that after an individual is nominated to a federal judgeship, the ABA Committee's rating of that in-

dividual would become a matter of public record through the Senate confirmation process.

9. Defendant is without sufficient information to admit or deny plaintiff's statement regarding disclosure of "other information" or disclosure to "other individuals." Defendant denies the remaining portions of paragraph 9 to the extent plaintiff's characterizations are inconsistent with and unsupported by the cited ABA Brochure. Defendant admits that the reasons for the ABA Committee's rating of a potential nominee are sometimes revealed to the Department of Justice, and that after an individual is nominated, those reasons are sometimes revealed to the Senate Judiciary Committee, but further states that the identities of the ABA Committee sources and the ABA Committee's internal reports remain confidential. ABA Brochure 6-10; WLF v. ABA, No. 85-3918, slip. op. at 203 (D.D.C. Nov. 26, 1986); WLF Complaint, Exh. D.

10. Defendant is without sufficient information to admit or deny the extent to which names of potential nominees have been given by the ABA to various individuals, groups, and organizations, but defendant does not dispute plaintiff's statement to the extent it is consistent with Exhibit D to plaintiff's Complaint (November 27, 1985 Letter from Robert B. Fiske, Jr.).

Respectfully submitted,
RICHARD K. WILLARD
Assistant Attorney General
JOSEPH diGENOVA
United States Attorney
/s/
ROBERT J. CYNKAR
Deputy Assistant Attorney General
/s/
DAVID J. ANDERSON
/s/
LINDA LANCE
/s/
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION, Plaintiff, and PUBLIC CITIZEN, Plaintiff-Intervenor,	)	
v.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	

ANSWER OF DEFENDANT-INTERVENOR AMERICAN BAR ASSOCIATION TO COMPLAINT OF WASHINGTON LEGAL FOUNDATION

Defendant-Intervenor, the American Bar Association ("ABA"), on behalf of itself and its Standing Committee on Federal Judiciary (the "Committee" or "ABA Committee"), hereby answers the complaint filed by Plaintiff Washington Legal Foundation ("WLF") as follows:

DEFENSES

FIRST DEFENSE

The Federal Advisory Committee Act ("FACA") does not apply to the ABA Committee because the ABA Committee does not constitute an "advisory co.nmittee" as defined in the FACA and regulations promulgated thereunder.

SECOND DEFENSE

The FACA, if applied to the ABA Committee, would violate the ABA Committee's First Amendment rights of freedom of speech and association by unconstitutionally intruding into the affairs of a private organization, while chilling the free

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63-64

effective input from minority groups and women's groups interested in the judicial selection process. This practice was discontinued in November of 1985, with a determination by the ABA Committee to obtain this information in other ways. The reasons for the Committee's decision are described in the letter (attached to WLF's complaint as Exhibit D) dated November 27, 1985, from Committee Chairman Robert B. Fiske, Jr., to Paul D. Kamenar, Executive Legal Director of WLF.

From time to time, the ABA Committee has received complaints that in its personnel makeup, and in its evaluations, it is too conservative. It has also received complaints that in its personnel makeup, and in its evaluations, it is too liberal. The ABA Committee's fact-gathering and evaluation functions exist independent of its members' own personal political and philosophical views.

To the extent the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

10. The ABA denies the allegations contained in this paragraph.

11. The ABA admits that the Chairman of the Committee routinely discusses via telephone calls with the Department of Justice representatives matters such as the timing of pending investigations of judicial candidates as well as the ABA Committee ratings which appear likely to result in such investigations. From time to time, in those instances where it appears that there is a significant possibility that the Committee may make a "Not Qualified" rating, the Chairman and one or more members of the Committee meet with representatives of the Department of Justice prior to the circulation of a formal report to all members of the Committee. To the extent that the allegations contained in this paragraph are inconsistent with the foregoing answer, such allegations are denied.

12. The ABA states that the decision whether to initiate or remove the candidate's name for consideration as a prospective nominee to the federal judiciary is one wholly made by the President of the United States. The ABA admits that from time to time, in those instances in which it appears that a rating of "Not Qualified" is a significant possibility, the Department of

Justice has told the Committee that a prospective nominee's name was being withdrawn from consideration for a particular vacancy. In that circumstance, the Committee does not conduct any further investigation or evaluation. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

13. The ABA states that the decision whether to nominate a candidate for the federal judiciary is made solely by the President of the United States, with the advice and consent of the Senate. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

14. The ABA admits that it is involved in the process of investigating and evaluating the qualifications of candidates for the federal judiciary. To the extent that the allegations of this paragraph are inconsistent with the foregoing answer, such allegations are denied.

15. The ABA admits that WLF sent a letter dated September 30, 1985, to the Chairman of the ABA Committee and that in such letter WLF demanded that the Committee provide WLF with the names of persons under consideration for federal judicial appointments. The ABA denies the remaining allegations contained in this paragraph.

16. The ABA is without knowledge or information sufficient to form a belief as to when WLF received Mr. Fiske's reply to WLF's letter dated September 30, 1985. The ABA admits that WLF sent a letter dated October 18, to Mr. Fiske and to the President of the ABA, William W. Falsgraf. The ABA also admits that in such letters WLF's demands become more intrusive, requesting that the ABA Committee "provide us with the reports and minutes of all meetings of your Committee held during the last two years where judicial nominees were discussed and considered, as well as inform us of the date and place of all future meetings." The ABA denies the remaining allegations contained in this paragraph.

17. The ABA admits that WLF transmitted a letter dated November 21, 1985, to Mr. Fiske. The ABA further states that

such letter speaks for itself. The ABA denies the remaining allegations contained in this paragraph.

18. The ABA admits that Mr. Fiske wrote a letter to WLF on November 27, 1985, which speaks for itself.

19. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

20. The ABA denies the allegations contained in this paragraph.

21. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-20 of WLF's complaint.

22. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

23. The ABA denies the allegations contained in this paragraph.

24. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-23 of WLF's complaint.

25. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

26. The ABA denies the allegations contained in this paragraph.

27. The ABA denies the allegations contained in this paragraph, except that the ABA admits that WLF seeks to attend and observe meetings of the ABA Committee and to obtain any transcripts of such meetings.

28. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-27 of WLF's complaint.

29. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

30. The ABA admits that no advisory committee charter has been filed with any party on behalf of the ABA Committee. The ABA states in further response that such filing is

neither necessary nor required by law. The ABA denies any remaining allegations contained in this paragraph.

31. The ABA denies that the ABA Committee has been or will be in violation of the FACA and deny that such Act even applies to the affairs of the ABA Committee.

32. The ABA hereby repeats and incorporates by reference herein its answers to paragraphs 1-31 of WLF's complaint.

33. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

34. The ABA states that the statutory provisions cited in this paragraph speak for themselves. The ABA denies any remaining allegations contained in this paragraph.

35. The ABA denies the allegations contained in this paragraph.

36. The ABA denies that the ABA Committee has been or will be in violation of the FACA and that such Act even applies to the affairs of the ABA Committee. The ABA denies that WLF is entitled to any relief.

Respectfully submitted,

/s/
Rex E. Lee
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Attorneys for Defendant-Intervenor American Bar Association

DATED: August 25, 1988

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WASHINGTON LEGAL FOUNDATION, Plaintiff, and PUBLIC CITIZEN, Plaintiff-Intervenor,	)	
v.	)	Civil Action No. 86-2883 (Judge Joyce Hens Green)
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	

ANSWER OF DEFENDANT-INTERVENOR AMERICAN BAR ASSOCIATION TO COMPLAINT OF PLAINTIFF-INTERVENOR PUBLIC CITIZEN

Defendant-Intervenor, the American Bar Association ("ABA"), on behalf of itself and its Standing Committee on Federal Judiciary (the "Committee" or "ABA Committee"), hereby answers the complaint filed by Plaintiff Washington Legal Foundation ("WLF") as follows:

DEFENSES

FIRST DEFENSE

The Federal Advisory Committee Act ("FACA") does not apply to the ABA Committee because the ABA Committee does not constitute an "advisory committee" as defined in the FACA and regulations promulgated thereunder.

SECOND DEFENSE

The FACA, if applied to the ABA Committee, would violate the ABA Committee's First Amendment rights of freedom of speech and association by unconstitutionally intruding into

the affairs of a private organization, while chilling the free speech and associational interests of the ABA Committee and third parties.

THIRD DEFENSE

The FACA, if applied to the ABA Committee, would impermissibly impinge on the ability of the President to discharge effectively the constitutionally-assigned executive power of judicial appointment, pursuant to Article II, Section 2, Clause 2 of the United States Constitution, thereby violating the principle of separation of powers.

FOURTH DEFENSE

Public Citizen's complaint fails to state a claim upon which relief can be granted.

Defendant-Intervenor ABA further answers Public Citizen's complaint as follows:

1. The ABA admits that Public Citizen is attempting to obtain declaratory and injunctive relief from this Court, and that Public Citizen purports to base its claim under the FACA, but otherwise denies the allegations contained in this paragraph.

2. The ABA admits the allegations contained in this paragraph.

3. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

4. The ABA admits that the Department of Justice is a government agency subject to the requirements of the FACA. The ABA denies that the ABA Committee has been and is "utilized" by the Department of Justice for the purpose of obtaining "advice and recommendation," as opposed to fact-gathering and evaluations, concerning the professional qualifications of prospective federal judicial nominees.

5. The ABA admits that the ABA Committee investigates and evaluates prospective federal judicial nominees and advises the Department of Justice of these evaluations. The ABA denies the remaining allegations contained in this paragraph.

6. The ABA admits that the Department of Justice forwards to the ABA Committee the names of possible nominees for federal judicial posts, that the ABA Committee investigates, evaluates and rates such candidates, and that the ABA Committee informs the Department of Justice of such ratings. To the extent that the allegations contained in this paragraph are inconsistent with the foregoing answer, such allegations are denied.

7. The ABA is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

8. The ABA denies the allegations contained in this paragraph.

9. The ABA denies the allegations contained in this paragraph.

10. The ABA denies the allegations contained in this paragraph. The ABA denies that Public Citizen is entitled to any relief.

Respectfully submitted,

/s/

Rex E. Lee
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Attorneys for Defendant-Intervenor American Bar Association

DATED: August 25, 1988

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